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Supreme Court, U.S.
FILED
MAY 12 2004
OFFICE OF THE CLERK

No. 03-931

IN THE

Supreme Court of the United States

THE STATE OF FLORIDA,

Petitioner,

vs.

JOE ELTON NIXON,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1) In a capital case in which there is overwhelming evidence of the defendant's guilt, is counsel's strategy to concede guilt in the opening and closing statements in the guilt phase trial ineffective assistance of counsel when the defendant consents to this approach?

2) Can the defendant's consent to counsel's strategy be implied rather than express?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 6

Argument 8

I

Nixon has the burden of proving that he did not consent to counsel's trial strategy in order to succeed under either *Cronic* or *Strickland* 8

A. *Cronic* and *Strickland* 8

B. Consent and Counsel. 9

II

A client's consent to trial counsel's strategy can be implied from the circumstances of the case 15

III

The trial court correctly found that Nixon consented to trial counsel's strategy 22

Conclusion 25

TABLE OF AUTHORITIES

Cases

Abshier v. State, 28 P. 3d 579 (Okla. Crim. App. 2001) 19, 23

Arizona v. Fulminante, 499 U. S. 279, 113 L. Ed. 2d 302, 111 S. Ct. 1246 (1991) 12

Bell v. Cone, 535 U. S. 685, 152 L. Ed. 2d 914, 122 S. Ct. 1843 (2002) 10, 13

Bordenkircher v. Hayes, 434 U. S. 357, 54 L. Ed. 2d 604, 98 S. Ct. 663 (1978) 20

Boykin v. Alabama, 395 U. S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969) 18, 19, 20

Brecht v. Abrahamson, 507 U. S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993) 12, 13

Brookhart v. Janis, 384 U. S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966) 18

Campbell v. United States, 365 U. S. 85, 5 L. Ed. 2d 428, 81 S. Ct. 421 (1961) 14

Chapman v. California, 386 U. S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) 12

Clark v. Community for Creative Non-Violence, 468 U. S. 288, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984) 14

Cuyler v. Sullivan, 446 U. S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980) 17

Espinoza v. Florida, 505 U. S. 1079, 120 L. Ed. 2d 854, 112 S. Ct. 2926 (1992) 24

Gerlaugh v. Stewart, 129 F. 3d 1027 (CA9 1997) 23

Godinez v. Moran, 509 U. S. 389, 125 L. Ed. 2d 321, 113 S. Ct. 2680 (1993) 15

Harris v. Alabama, 513 U. S. 504, 130 L. Ed. 2d 1004, 115 S. Ct. 1031 (1995) 24

In re Tahl, 1 Cal. 3d 122, 81 Cal. Rptr. 577, 460 P. 2d 449 (1969) 20

Johnson v. Zerbst, 304 U. S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938) 19

Jones v. Barnes, 463 U. S. 745, 77 L. Ed. 2d 987, 103 S. Ct. 3308 (1983) 13

Kyles v. Whitley, 514 U. S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995) 12, 13

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966) 16, 17

Nixon v. Singletary, 758 So. 2d 618 (Fla. 2000) 5, 8, 10, 18, 19, 24

Nixon v. State, 572 So. 2d 1336 (Fla. 1990) 2, 3, 4, 23

Nixon v. State, 857 So. 2d 172 (Fla. 2003) 5, 6, 16, 19, 22, 23

North Carolina v. Butler, 441 U. S. 369, 60 L. Ed. 2d 286, 99 S. Ct. 1755 (1979) 16, 17

Parke v. Raley, 506 U. S. 20, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992) 19

People v. Mayfield, 5 Cal. 4th 142, 19 Cal. Rptr. 2d 836, 852 P. 2d 331 (1993) 23

People v. Murphy, 8 Cal. 3d 349, 105 Cal. Rptr. 138, 503 P. 2d 594 (1972) 20

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158,
53 S. Ct. 55 (1932) 9

Ring v. Arizona, 536 U. S. 584, 153 L. Ed. 2d 556,
122 S. Ct. 2428 (2002) 24

Roe v. Flores-Ortega, 528 U. S. 470, 145 L. Ed. 2d 985,
120 S. Ct. 1029 (2000) 11, 13, 14, 21, 22

Schneckloth v. Bustamonte, 412 U. S. 218,
36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973) 16

Strickland v. Washington, 466 U. S. 668, 80 L. Ed. 2d 674,
104 S. Ct. 2052 (1984) ..... Passim

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108 S. Ct. 646 (1988) 15

United States v. Ash, 413 U. S. 300, 37 L. Ed. 2d 619,
93 S. Ct. 2568 (1973) 17

United States v. Cronic, 466 U. S. 648, 80 L. Ed. 2d 657,
104 S. Ct. 2039 (1984) 4, 8, 9, 10, 11, 14, 18

United States v. Drayton, 536 U. S. 194, 153 L. Ed. 2d 242,
122 S. Ct. 2105 (2002) 16

United States v. Muldrow, 19 F. 3d 1332
(CA10 1994) 16

Treatises

1 J. Strong, McCormick on Evidence (5th ed. 1999) 5

8 J. Wigmore, Evidence (McNaughton rev. 1961) 5

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Miscellaneous

Developments in the Law—Privileged Communications,
98 Harv. L. Rev. 1450 (1985) 5

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Different?, 42 Mercer L. Rev. 695 (1991) 24

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case addresses the scope of the right to the effective assistance of counsel. The Florida Supreme Court's holding that a client's consent to trial counsel's strategy of conceding guilt in the opening and closing arguments must be express

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

dangerously overstates the Sixth Amendment right. The right to effective assistance of counsel is not a detailed code of conduct for criminal defense counsel. This decision requires an unrealistic level of formality between counsel and client, and its definition of consent is contrary to the accepted definition of that term. This needlessly threatens reliable convictions and may deter counsel from representing criminal defendants. The lost convictions and delays resulting from this overly broad definition of ineffective assistance of counsel are contrary to the interests of public safety and society that the CJLF was formed to serve.

SUMMARY OF FACTS AND CASE

"On Monday, August 13, 1984, the charred body of Jeanne Bickner was found tied to a tree in a wooded area in Leon County," Florida. *Nixon* v. *State*, 572 So. 2d 1336, 1337 (Fla. 1990) (*Nixon I*). Her car was found the next day in a Tallahassee drainage ditch, abandoned and burned. See *ibid.* That same day police received information from Nixon's girlfriend and his brother that Nixon had admitted to murdering Ms. Bickner, driving her car before burning it, and pawning two of her rings. See *ibid.* Nixon was arrested and "charged with first-degree murder, kidnapping, robbery, and arson." *Ibid.*

The case for Nixon's guilt was overwhelming. In addition to the confessions to his girlfriend and brother, Nixon was seen driving Ms. Bickner's car on the last day she was seen alive near where her body was found. See *id.*, at 1338. Nixon's palm print was found on the trunk of Ms. Bickner's car. See *ibid.* He also confessed to the police, telling them

> "how he met Ms. Bickner at the mall and asked her to take him to his uncle's house because he was having car trouble. Once on the road, Nixon hit Bickner in the face. When she stopped the car, Nixon put her in the trunk and then drove to a secluded wooded area where he took her from the trunk and tied her to a tree with jumper cables. According to Nixon, the two talked about their lives. Ms. Bickner offered to give Nixon money, to sign her car over to him, begging him not to kill her. Nixon recounted how he burned Ms. Bickner's personal belongings and then threw the top of the convertible into the fire. At some point after placing a paper bag over her head, Nixon threw the smoldering convertible top on Ms. Bickner, setting her on fire." *Ibid.*

Ms. Bickner was alive when she was set on fire, and she burned to death. See *ibid.*

In his opening statement, the defense counsel stated:

> "In this case, there will be no question that Jeannie [sic] Bickner died a horrible, horrible death. Surely she did and that will be shown to you. In fact, that horrible tragedy will be proved to your satisfaction beyond any reasonable doubt.
>
> "In this case, there won't by any question, none whatsoever, that my client, Joe Elton Nixon, caused Jeannie [sic] Bickner's death. Likewise, that fact will be proved to your satisfaction beyond any reasonable doubt. This case is about the death of Joe Elton Nixon and whether it should occur within the next few years by electrocution or maybe its natural expiration after a lifetime of confinement." *Id.*, at 1339.

Defense counsel's closing argument contained the following passage:

> "Ladies and gentlemen of the jury, I wish I could stand before you and argue that what happened wasn't caused by Mr. Nixon, but we all know better. For several very obvious and apparent reasons, you have been and will continue to be involved in a very uniquely tragic case. In just a little while Judge Hall will give you some verdict forms that have been prepared. He'll give you some instructions on how to deliberate this case. After you've gotten those forms and you've elected your foreperson and you've done what you must do, you will sign those forms.

> I know you are not going to take this duty lightly, and I know what you will decide will be unanimous. I think that what you will decide is that the State of Florida, Mr. Hankinson and Mr. Guarisco, through them, has proved its case against Joe Elton Nixon. I think you will find that the State has proved beyond a reasonable doubt each and every element of the crimes charged, first-degree premeditated murder, kidnapping, robbery, and arson." *Ibid.*

Nixon was convicted of all charges and sentenced to death. See *id.*, at 1338.

On his direct appeal, Nixon attacked his conviction and sentence on several grounds, including a claim that the opening and closing statements were *per se* ineffective assistance of counsel under *United States* v. *Cronic*, 466 U. S. 648 (1984). See *Nixon*, 572 So. 2d, at 1338-1339. The Florida Supreme Court remanded the case to the trial court for a hearing to determine whether Nixon was informed of trial counsel's strategy in the opening and closing statements. See *ibid.*

The trial court made several findings. First, it found that trial counsel reviewed the defense with Nixon, including "the probability that he would concede the killing of the victim by Nixon." It also concluded that trial counsel and Nixon had prior attorney-client relationships, were both veterans of the justice system, and that Nixon understood what was happening. Since Nixon did not object to the strategy, see *id.*, at 1340, n. 3, the trial court then concluded that Nixon had not met his burden of proving that he did not know or consent to the trial strategy. See *ibid.* The Florida Supreme Court felt that this record was insufficient to rule on the ineffective assistance of counsel claim and therefore dismissed it without prejudice to raising it again on state collateral review. See *id.*, at 1340. Nixon's other claims were rejected, and his convictions and sentences were affirmed.

Nixon then raised his ineffective assistance claim in a motion for state post-conviction relief, which the trial court

denied without an evidentiary hearing. See *Nixon* v. *Singletary*, 758 So. 2d 618, 619 (Fla. 2000) (*per curiam*) (*Nixon II*). Nixon appealed this decision to the Florida Supreme Court and also filed an original habeas petition there. See *ibid.* The State asked the Court to examine counsel's opening and closing arguments under the traditional ineffective assistance standard of *Strickland* v. *Washington*, 466 U. S. 668 (1984), while Nixon argued that the *per se* ineffective assistance standard of *Cronic* was appropriate. See *Nixon II*, *supra*, at 621.

The court applied *Cronic*. Since the defendant has ultimate control over whether to plead guilty, see *id.*, at 623, and the court considered counsel's action to be the equivalent of a guilty plea, it reasoned that "the dispositive issue in this case is whether Nixon gave his consent to trial counsel to concede guilt during the guilt phase of the trial." *Id.*, at 624. The Florida Supreme Court's efforts to obtain the facts regarding Nixon's consent were hindered by his invocation of the attorney-client privilege. See *ibid.* The Court remanded for yet another evidentiary hearing on consent, this time making it clear that, by placing the effectiveness of his attorney at issue, Nixon had waived the privilege. See *id.*, at 624-625. This is well-established law. "Where the client alleges a breach of duty by the attorney, the privilege is waived to all communications relevant to that issue." See 8 J. Wigmore, Evidence § 2327, p. 638 (McNaughton rev. 1961); see also Restatement (Third) of the Law Governing Lawyers § 80, p. 608 (2000); 1 J. Strong, McCormick on Evidence § 91, pp. 367-368 (5th ed. 1999); Developments in the Law—Privileged Communications, 98 Harv. L. Rev. 1450, 1637-1638 (1985).

Nixon did not testify at this hearing, but his trial counsel did. See *Nixon* v. *State*, 857 So. 2d 172, 175 (Fla. 2003) (*per curiam*) (*Nixon III*). During trial counsel's testimony, the following exchange took place:

> "Q: [Nixon's Postconviction Counsel] Did you discuss the strategy of not contesting guilt with the defendant?

"A: [Corin [Nixon's trial counsel]] I thought I answered it. But if I didn't answer it, then yes, he was advised as to that, yes.

"Q: And how did he respond?

"A: To the best of my knowledge, again he did nothing, except after it occurred that he was not real pleased. And I think I answered that before also.

"Q: Now what do you mean by he did nothing?

"A: He did nothing. I don't know. I don't know what else I can say, Mr. Evans. I have said it before." *Ibid.*

Trial counsel also testified "that Nixon provided neither verbal nor nonverbal indication that he did or did not wish to pursue counsel's strategy of conceding guilt." *Id.*, at 175-176. Trial counsel's testimony "essentially mirrored his testimony given at the December 19, 1988 evidentiary hearing, at which Nixon invoked the attorney-client privilege." The Florida Supreme Court concluded that "both the direct and cross-examination of [trial counsel] Corin were extremely limited." *Id.*, at 176, n. 8. The trial court again found that Nixon had consented to counsel's trial strategy and denied relief. See *id.*, at 175.

The Florida Supreme Court reversed. Since trial counsel's opening and closing arguments "were the functional equivalent of a guilty plea" there had to be substantial evidence "that Nixon did more than silently submit to counsel's strategy" before this ineffective assistance claim could be dismissed. *Id.*, at 176. Since this evidence did not exist, Nixon's conviction was vacated on the ground of ineffective assistance of counsel. See *ibid.* This Court granted certiorari on March 1, 2004.

SUMMARY OF ARGUMENT

The presumption of prejudice found in *United States* v. *Cronic* is a rare exception to the general rule that the defendant

must prove substandard conduct by counsel that prejudiced the defense. In this case, *Cronic*, if applicable, would act as a substitute for the prejudice component of *Strickland* v. *Washington*. Since the prejudice and substandard conduct components play important roles in protecting the system from excessive ineffective assistance claims, *Cronic* only applies to nearly total breakdowns of the adversarial system. Therefore, *Cronic* can only apply to Nixon's claim, if counsel's action was the equivalent of a guilty plea. Since a guilty plea is valid with the client's consent, Nixon's consent to the trial strategy would extinguish his *Cronic* claim. If *Cronic* does not apply, then consent also rebuts any claim of ineffective assistance under *Strickland* v. *Washington*.

Cronic's presumption of prejudice changes but does not eliminate the defendant's burden of proof. Any circumstances of the case that would support applying *Cronic* must still be pled and proven by the defense. This includes Nixon's lack of consent, which is information uniquely within his control, and is therefore appropriate for him to bear the burden of proving.

The Florida Supreme Court's conclusion that Nixon's waiver must be express contradicts both the law governing consent and the right to the effective assistance of counsel. Implied consent is appropriate in other constitutional contexts, such as the waiver of the presence of counsel under *Miranda* v. *Arizona*. Because it lacks the adversarial posture of the interrogation room, the relationship between client and counsel supports an even more expansive view of implied consent than the one found in *Miranda*. Any attempt to graft the formality of a guilty plea onto the consent between client and counsel in this case misconstrues that relationship and the nature of the guilty plea.

The Florida Supreme Court's one-size-fits-all approach to consent contradicts the cases governing ineffective assistance of counsel. These cases recognized that the Sixth Amendment does not create a set of detailed guidelines for counsel to

follow. Rather, courts must examine each case on its own facts.

The trial court correctly found that Nixon implicitly consented to trial counsel's strategy. It relied on Nixon's burden of proving a lack of consent, counsel's consultation with Nixon about the strategy, and Nixon's failure to communicate any disapproval. Nothing more is necessary to find a valid consent to trial counsel's strategy.

ARGUMENT

I. Nixon has the burden of proving that he did not consent to counsel's trial strategy in order to succeed under either *Cronic* or *Strickland*.

A. Cronic and Strickland.

In order for Nixon to prevail in this case, he must prove that he did not consent to trial counsel's concession of guilt in the opening and closing statements. Nixon's claim is that *United States* v. *Cronic*, 466 U. S. 648 (1984) governs this case. See *Nixon II*, 758 So. 2d, at 621. The Florida Supreme Court adopted Nixon's argument because it equated trial counsel's opening and closing statements with a guilty plea. See *id.*, at 623-624. It then concluded that since trial counsel's strategy was equal to a guilty plea, *Cronic*'s presumption of prejudice would prevail unless Nixon consented to the strategy. See *id.*, at 624. While the trial strategy was not equal to a guilty plea, see *infra*, at 18-19, the Florida Supreme Court correctly placed consent at the center of its analysis. Nixon's consent to trial counsel's plan will eliminate any ineffective assistance claim in this case, whether it is made under *Cronic* or under *Strickland* v. *Washington*, 466 U. S. 668 (1984).

Cronic is a narrow exception to the general rule governing ineffective assistance of counsel claims. Counsel is presumptively competent, and the accused has the burden of overcoming this presumption. See *Cronic*, 466 U. S., at 658. This

normally requires the accused to prove that counsel's performance was deficient, and that the deficiency "prejudiced the defense." *Strickland*, 466 U. S., at 668. The accused can only prevail by carrying the burden of proving that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Ibid.* *Cronic* is simply a rule of convenience. *Strickland*'s test is unnecessary under certain extreme circumstances. Where the circumstances of the defendant's representation are so clearly prejudicial to the defense that "the cost of litigating their effect in a particular case is unjustified," *Cronic*, *supra*, at 658, *Cronic*'s presumption of prejudice is appropriate. See *id.*, at 659-660.

B. Consent and Counsel.

The *Cronic* rule is reserved for the nearly complete breakdown of the adversarial process. The "obvious" example "is the complete denial of counsel." See *id.*, at 659. The presumption also applies where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . . ." *Ibid.* For example, a complete inability to effectively cross-examine prosecution witnesses would come under this definition. See *ibid.* Finally, other circumstances that would prevent any counsel from rendering effective assistance, like the circumstances surrounding the infamous "Scottsboro boys" trial, see *Powell* v. *Alabama*, 287 U. S. 45 (1932),[2] warrants a presumption of prejudice. See *Cronic*, *supra*, at 660.

Depending upon the circumstances of the case, applying *Cronic* will substitute its standard for the prejudice requirement

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2. In *Powell*, the defendants were indicted for a highly publicized capital offense and faced considerable racial animosity from the community. See 287 U. S., at 50-51. On the day of the trial, a Tennessee lawyer told the court that he was appearing on behalf of people "interested" in the defendants, but that he was in no way prepared to represent them. *Id.*, at 55. The trial court decided that the Tennessee lawyer would represent the defendants with whatever help the local bar could provide, and then immediately started the trial. See *id.*, at 56-58.

or for both the prejudice and the attorney misconduct components of *Strickland*. For instance, it is pointless to apply either part of the *Strickland* test to a failure to provide counsel. Similarly, the circumstances surrounding the representation in *Powell* substitute both for prejudice and attorney misconduct. In such a case, "where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected." *Bell* v. *Cone*, 535 U. S. 685, 696 (2002). In other cases, the defendant will not have to show prejudice, but still must prove some form of misconduct in order to prevail under *Cronic*. *Cronic*'s second example of representation that fits its presumption, where "counsel entirely fails to subject the prosecutor's case to meaningful adversarial testing," 466 U. S., at 659, still requires the defendant to prove substandard conduct. While prejudice is presumed, the defendant must still prove attorney misconduct in the form of the complete failure to test the prosecution's case.

If *Cronic* applies to this case, it would come under the failure to test the prosecution's case theory. See *Nixon II*, 758 So. 2d, at 622. While applying *Cronic* to Nixon's claim would make a prejudice inquiry unnecessary, Nixon must still show that counsel's decision to concede guilt was improper. A concession of guilt in the guilt phase of a capital trial, if properly consented to by the defendant, is not substandard representation. See *infra*, at 24-25. Therefore, if Nixon consented to counsel's strategy, then *Cronic* cannot apply to his claim. This conclusion follows from an understanding of right to effective assistance of counsel and *Cronic*'s role in administering claims under that right.

The overwhelming majority of trials do not involve the complete breakdown of the adversarial process contemplated in *Cronic*. The facts of *Cronic* itself provide one example. Cronic was facing a variety of mail fraud charges, and retained counsel withdrew shortly before the scheduled trial date. See 466 U. S., at 649. Counsel was appointed for Cronic, but was

allowed only 25 days to prepare. See *ibid.* The government's investigation was complex, taking four and one-half years and involving the review of thousands of documents. See *ibid.* Appointed counsel was "a young lawyer with a real estate practice . . . ." *Ibid.* The circumstances of Cronic's representation did not support a presumption of prejudice, because it was not "unlikely that the defendant could have received the effective assistance of counsel." *Id.*, at 666. Absent a showing of "specific errors made by trial counsel" Cronic's conviction would stand. See *ibid.*

While necessary, attack on judgments for effective assistance of counsel contains real risks to the criminal justice system. The *Strickland* Court understood that an overly broad definition of ineffective assistance could backfire. A standard permitting an intrusive inquiry into counsel's performance or a set of "detailed guidelines for evaluation would encourage the proliferation of ineffectiveness challenges." *Strickland*, 466 U. S., at 690. If this were allowed, then any conviction would be followed by a trial of counsel's representation of the defendant. See *ibid.* This could only adversely affect counsel's "performance and even willingness to serve . . . ." *Ibid.* Both parts of the *Strickland* standard are designed to prevent such consequences. Review of counsel's actions is "highly deferential" under *Strickland*. *Id.*, at 689. Counsel's performance does not have to be optimal; under *Strickland* it only needs to be reasonable. See *id.*, at 688. The prejudice component is also meant to prevent the right to effective assistance from damaging the system. The right to effective assistance of counsel does not exist for its own sake, but to guarantee a fair trial. See *Roe* v. *Flores-Ortega*, 528 U. S. 470, 482 (2000) (quoting *Cronic*, 466 U. S., at 658). Requiring the defendant to prove prejudice helps to prevent the Sixth Amendment from becoming a vehicle for correcting attorney errors. All lawyers make mistakes, but only prejudicial mistakes warrant setting aside convictions.

The states and the federal government have a substantial interest in preserving the integrity of their convictions.

> "Retrying defendants whose convictions are set aside also imposes significant 'social costs,' including the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.' " *Brecht* v. *Abrahamson*, 507 U. S. 619, 637 (1993) (quoting *United States* v. *Mechanik*, 475 U. S. 66, 72 (1986)) (internal quotation marks omitted by *Brecht* Court).

Similarly, the doctrine of harmless constitutional error is based upon the importance of preserving convictions even in the face of error by state actors. See *ibid.* (finding error harmless on federal habeas unless it had a substantial effect on the verdict); *Chapman* v. *California*, 386 U. S. 18, 24 (1967) ("harmless beyond a reasonable doubt" on direct review). Errors which are susceptible to harmless error are deemed " 'trial error.' " See *Arizona* v. *Fulminante*, 499 U. S. 279, 307 (1991). They "occur[ ] during the presentation of the case to the jury," making them susceptible to harmless error analysis because they "may . . . be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless . . . ." *Id.*, at 307-308. Error that goes to the structure of the "trial mechanism" is incapable of this type of analysis. See *id.*, at 309-310. Such defects, like the complete deprivation of the right to counsel, "infect the entire trial process." *Brecht*, 507 U. S., at 629-630.

Strickland's prejudice requirement is analogous to a harmless error requirement. If the erroneous representation does not have a sufficient impact on the verdict, then the conviction will stand. *Strickland* differs from traditional harmless error analysis by affording greater protection to convictions. Although similar in kind, *Strickland*'s hurdle is higher than *Brecht*'s. See *Kyles* v. *Whitley*, 514 U. S. 419, 439

(1995). In addition, while the prosecution carries the burden of proving harmless error on direct review, see *id.*, at 630, the defendant bears the burden of proving prejudice under *Strickland*. See *Strickland*, 466 U. S., at 696.

Since *Cronic* suppresses this important limit on ineffective assistance claims, it should be limited to the most extreme cases. Thus, an "attorney's failure to test the prosecutor's case . . . must be *complete*" for *Cronic* to apply. *Bell* v. *Cone*, 535 U. S., at 697 (emphasis added). For example, the failure to present any mitigating evidence or closing argument in the penalty phase of a capital trial is analyzed under *Strickland* instead of *Cronic*. See *id.*, at 697-698. Whether *Strickland* or *Cronic* applies depends upon "the magnitude of the deprivation of the right to effective assistance of counsel." *Roe*, 528 U. S., at 482. The difference between *Strickland* and *Cronic* is "not of degree but of kind." *Bell*, 535 U. S., at 697. In order for Nixon's representation to qualify for *Cronic*'s presumption, it must be orders of magnitude more prejudicial than mere attorney error.

Because *Cronic* is so unusual and severe, Nixon's consent to counsel's strategy would eliminate his *Cronic* claim. The worst characterization of trial counsel's conduct is that it was a slow guilty plea. If counsel's actions are not comparable to a guilty plea then *Cronic* does not apply. Whether to plead guilty is a decision left to the exclusive control of the defendant. See *Jones* v. *Barnes*, 463 U. S. 745, 751 (1983). Since the defendant controls this decision, an informed and voluntary consent to counsel's strategy ratifies it, making *Cronic* inapplicable.

Flores-Ortega illustrates this point. Counsel failed to file a notice of appeal which led to a loss of the accused's right to appeal his conviction. See 528 U. S., at 474. While a failure to file an appeal requested by the defendant is "professionally unreasonable . . . a defendant who explicitly tells his attorney *not* to file an appeal cannot later complain that" no appeal was filed. *Id.*, at 477 (emphasis in original). Even though filing an

appeal usually cannot harm the defendant, failing to do this is not ineffective assistance if the client consents. While denial of a desired appeal is presumptively prejudicial, see *id.*, at 483, consent ends the *Cronic* issue. Similar reasoning is appropriate here.

Cronic's presumption changes but does not eliminate the defendant's initial burden of proof. The presumption of ineffective assistance comes from certain circumstances of the case which support a presumption that the fairness of the trial was undermined. See 466 U. S., at 658 ("circumstances that are so likely to prejudice"); *id.*, at 659 ("circumstances of that magnitude"); *id.*, at 661 ("the surrounding circumstances"). Simply alleging these circumstances cannot trigger the irrebuttable presumption that vacates a conviction. These circumstances must be pled and proven by the defendant before *Cronic*'s presumption applies.

In this case, Nixon must prove trial counsel's opening and closing statements along with his lack of informed consent. Since consent would end the ineffective assistance claim before the *Cronic* presumption would apply, it is sensible to address this issue first. The extent of Nixon's prior consent to trial counsel's approach in the opening and closing statements is *only* known to Nixon and his trial counsel. "[T]he burden of proving a particular fact is said to be put on the *party who presumably has peculiar means of knowledge*. . . ." 9 J. Wigmore, Evidence § 2486, p. 290 (Chadbourn rev. 1981) (emphasis in original); *Campbell* v. *United States*, 365 U. S. 85, 96 (1961) ("the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary"). Since Nixon was raising his claim to overturn his conviction, the case for placing the burden of proving a lack of consent on him is compelling. "[T]he general rule [is] that one seeking relief bears the burden of demonstrating that he is entitled to it." *Clark* v. *Community for Creative Nonviolence*, 468 U. S. 288, 293, n. 5 (1984).

If Nixon does not carry his burden of proving that he did not consent to trial counsel's strategy, then his Sixth Amendment claim fails. If *Cronic* does not apply, then at most he can allege that trial counsel's strategy was deficient and prejudicial under *Strickland*. Consent also eliminates this means of relief. A necessary condition for a *Strickland* claim is that counsel's representation is substandard. See 466 U. S., at 687. If Nixon consented to what is at worst a guilty plea, he did not receive objectively unreasonable assistance of counsel. Communications between counsel and client can provide crucial support for the reasonableness of counsel's actions. While most decisions about the conduct of the trial are left to counsel, see *Taylor* v. *Illinois*, 484 U. S. 400, 417-418 (1988), a client's informed consent to a particular tactic or strategy should be dispositive under *Strickland*. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." *Strickland*, *supra*, at 691. If a case goes to trial, then the client will often play an important role in determining trial strategy. See *Godinez* v. *Moran*, 509 U. S. 389, 398 (1993). An informed consent to a strategy discussed between counsel and client should be binding on any defendant making a *Strickland* claim. If the client gives an informed consent to a particular approach to the defense, then that approach is necessarily reasonable under *Strickland*. Therefore, a failure to prove the absence of consent ends Nixon's ineffective assistance of counsel claim.

II. A client's consent to trial counsel's strategy can be implied from the circumstances of the case.

The Florida Supreme Court held that consent to trial counsel's strategy would be valid only if there is "substantial evidence which establishes that Nixon *affirmatively* and

explicitly agreed to counsel's strategy." *Nixon III*, 857 So. 2d, at 176 (emphasis in original) (Nixon III). This asks too much of the relationship between counsel and client. Requiring this level of formal proof is contrary to the standard approach to the consent issue, and is also at odds with this Court's understanding of the guarantee of effective assistance of counsel. Upholding implied consent in relations between client and counsel does no disservice to the defendant's right to counsel. Instead, it recognizes that consent comes in many forms and that the relationship between client and counsel cannot be defined by rigid formalities.

Consent is normally determined by examining the totality of the circumstances. See *United States* v. *Drayton*, 536 U. S. 194, 207 (2002) (consent to search). Constitutional rights can be waived by implication, and a court can infer waiver after examining all relevant circumstances. See *North Carolina* v. *Butler*, 441 U. S. 369, 373 (1979). "Even when a right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' " *Id.*, at 374-375 (quoting *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938)). This applies to other forms of consent, such as consent to search. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 226-227 (1973). The trial court correctly looked to Nixon's relationship with counsel and the other facts surrounding this case before determining that there was consent. See Part III, *infra*. The Florida Supreme Court's decision to ignore these circumstances and apply a bright-line rule contradicts the proper approach to consent.

Consent is not normally susceptible to bright-line rules. "There is no bright line test for determining consent; each is a question of fact to be determined from the totality of the circumstances." *United States* v. *Muldrow*, 19 F. 3d 1332, 1336 (CA10 1994). *Butler* addressed whether *Miranda* v. *Arizona*, 384 U. S. 436 (1966) required an explicit waiver of

the suspect's right to the presence of counsel. See 441 U. S., at 370. Under *Miranda*, an explicit waiver was acceptable, but mere silence after *Miranda* warnings would not prove waiver. See *id.*, at 373. While an express waiver is "usually strong proof of the validity of that waiver . . . it is not inevitably either necessary or sufficient to establish waiver." *Ibid.* The waiver issue could not be decided by applying a bright-line rule. "The question is not one of form, but rather whether the defendant knowingly and voluntarily waived the rights delineated in the *Miranda* case." *Ibid.* Under this holistic approach, courts must always look to all of the surrounding facts and circumstances of the case. Even silence could support a waiver under the appropriate circumstances.

> "As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated." *Ibid.*

The case for an implied waiver is much stronger in the context of an attorney-client relationship than in *Miranda*'s interrogation room. *Miranda* deals with a situation where the suspect "is not in the presence of persons acting solely in his interest." 384 U. S., at 469. It is therefore understandable that the government has a "heavy burden" of proving waiver under *Miranda*. See *id.*, at 475. The relationship between counsel and client is much different, and therefore consent should be more readily inferred.

Counsel and client are allies rather than adversaries. Counsel has a duty to represent the client with an undivided loyalty. See *Cuyler* v. *Sullivan*, 446 U. S. 335, 346 (1980). A lawyer is the client's advocate and adviser, see *United States* v. *Ash*, 413 U. S. 300, 312 (1973), not an adversary. Since the

client has the burden of proving that counsel rendered ineffective assistance under *Strickland* v. *Washington*, 466 U. S. 668 (1984) and *United States* v. *Cronic*, 466 U. S. 648 (1984), it is appropriate to require the defendant to prove a lack of consent when contesting counsel's representation. See *supra*, at 14-15. A rule against implied consent is simply inconsistent with the reality of the relationship between client and counsel.

Counsel's consultation with Nixon, and Nixon's lack of objection to the strategy, also distinguishes *Brookhart* v. *Janis*, 384 U. S. 1 (1966). In that case counsel agreed to a trial by a "prima facie trial," a procedure where the defense agrees not to put evidence on or cross-examine any prosecution witnesses. See *id.*, at 6-7. The defendant stated in open court that he did not consent to any guilty plea. *Id.*, at 6. This Court held that counsel cannot enter what is the equivalent to a guilty plea against the express wishes of his client not to plead guilty. See *id.*, at 7. *Brookhart* was also cited by *Cronic* as an example of a complete failure to test the prosecution's case. See 466 U. S., at 659. Since *Nixon* never explicitly stated any objection to counsel's strategy at any point during the trial, *Brookhart* is inapplicable.

Guilty pleas do require a higher level of formality, see *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969), and the Florida Supreme Court did invoke *Boykin* in support of its decision. See *Nixon II*, 758 So. 2d, at 624. This overstates the effect of trial counsel's strategy and understates the effect of a guilty plea. A guilty plea waives numerous rights, including the self-incrimination privilege, the right to jury trial and the right to confrontation. See *Boykin*, *supra*, at 243. Given these consequences, silence coupled with a bare record is insufficient to establish the consent that due process requires. See *id.*, at 242-243. Counsel's opening and closing statements may waive the self-incrimination privilege, a right that Nixon had already waived in each of his confessions to the police, but Nixon and counsel could still confront witnesses, and a jury still had to render a guilty verdict. Unlike a guilty plea, trial counsel's

strategy did not end the guilt phase of the trial. Nixon's attorney still conducted an active defense of his client. As the dissent in the second Florida Supreme Court opinion noted:

> "Even though Nixon was voluntarily absent from much of the trial, Nixon's trial counsel actively engaged in the trial, including conducting an extensive voir dire, objection to photographs as unduly gruesome, and moving for a mistrial as to a portion of the State's closing in the guilt phase. In the penalty phase, Nixon's trial counsel presented the testimony of eight witnesses, including Nixon's mother and two mental health experts, a psychiatrist, and a psychologist. Nixon's trial counsel introduced substantial documentary evidence, including school, institution, and psychological reports concerning Nixon's life from 1972 to 1985." *Nixon II*, 758 So. 2d, at 630-631 (Wells, J., dissenting).

Where counsel cross-examines the prosecution witnesses, the defendant did not give up a jury trial, and the defendant did not testify, there is no guilty plea, even if counsel concedes guilt. See *Abshier* v. *State*, 28 P. 3d 579, 595 (Okla. Crim. App. 2001).

Boykin held that the waiver of rights in a guilty plea could not be presumed from a silent record. See 395 U. S., at 242. The trial court's ruling in the present case was drawn from the totality of the circumstances of a record that was not silent. See *Nixon III*, 857 So. 2d, at 176. *Boykin* also relied on the federal standard for guilty pleas, which drew its definition of waiver from *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938), see *Boykin*, *supra*, at 243, n. 5, and the *Zerbst* standard requires courts to look to the totality of circumstances when examining a waiver. See 304 U. S., at 464. *Boykin*'s formalities should not be used to ignore a valid consent that can be found from the record.

Boykin's colloquy between judge and defendant, see *Parke* v. *Raley*, 506 U. S. 20, 30 (1992), is designed to provide a public record that the guilty plea was knowing and voluntary.

See *Bordenkircher* v. *Hayes*, 434 U. S. 357, 362 (1978); see also *Boykin*, 395 U. S., at 242 ("The requirement that the prosecution spread on the record the prerequisites of a valid waiver . . ."). In a case involving overwhelming evidence of guilt and where counsel presents a minimal defense or concedes guilt, *Boykin* is not necessary so long as there is a trial. The California Supreme Court came to this conclusion when applying California's version of *Boykin*, *In re Tahl*, 1 Cal. 3d 122, 460 P. 2d 449 (1969), overruled on other grounds, *Mills* v. *Municipal Court*, 10 Cal. 3d 288, 307, 515 P. 2d 273, 286 (1973). Like *Boykin*, "*Tahl* and its offspring" are intended to provide a record that the guilty plea was knowing and intelligent. See *People* v. *Murphy*, 8 Cal. 3d 349, 366, 503 P. 2d 594, 606 (1972).

> "Nothing in our decisions following *Tahl* indicates that the principles expressed therein were intended to apply to jury trials, even where the evidence of guilt is overwhelming. When a defendant undergoes a jury trial any competent defense counsel will inform him of his right to call witnesses on his own behalf, of his right to testify or not to testify, and, in the absence of unusual circumstances, will cross-examine the witnesses for the prosecution. Here, defendant's case was tried to a jury. Through counsel he clearly exercised his right of confrontation by cross-examining prosecution witnesses and he took advantage of his right against self-incrimination by not taking the witness stand." *Ibid.*

The present case is no different. The record establishes that trial counsel consulted with Nixon about the strategy, and there was a jury trial in which Nixon did not take the stand, and in which prosecution witnesses were cross-examined. No more is needed to distinguish *Boykin*.

It is impractical to impose the formal question and answer process required by *Boykin* on agreements between client and counsel. "There are countless ways to provide effective assistance in a given case," *Strickland*, 466 U. S., at 689, and

each defendant will have individual preferences in communicating with counsel. The one-size-fits-all rule imposed by the Florida Supreme Court improperly turns the Sixth Amendment into a code of conduct for criminal defense counsel.

> "But we have consistently declined to impose mechanical rules on counsel—even when those rules might lead to better representation—not simply out of deference to counsel's strategic choices, but because 'the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, . . . [but rather] simply to ensure that criminal defendants receive a fair trial.' " *Roe* v. *Flores-Ortega*, 528 U. S. 470, 481 (2000) (quoting *Strickland*, 466 U. S., at 689).

Accepting a client's implied consent to trial counsel's strategy is consistent with *Flores-Ortega*. That decision addressed whether "counsel [is] deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other." *Id.*, at 477. This question was best answered by answering another question, "whether counsel in fact consulted with the defendant about an appeal." *Id.*, at 478. Consultation has a specific meaning in this context, "advising the defendant about the advantages and disadvantages of taking an appeal, and making a reasonable effort to discover the defendant's wishes." *Ibid.* Proper consultation allows the right to appeal to be waived by implication. If the defendant is consulted in this manner, then "[c]ounsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Ibid.*

Similar reasoning applies to this case. A decision not to file a notice of appeal is more difficult to defend than trial counsel's representation of Nixon. The failure to file in *Flores-Ortega* forfeited the entire proceeding. See *id.*, at 483. Nixon's guilt phase trial was not forfeited. Rather, it was part of an effort to win the only proceeding in which Nixon had a reasonable chance to prevail, the penalty phase. If trial counsel explained

his trial strategy to Nixon, and Nixon did not object to it, then there was consent.

III. The trial court correctly found that Nixon consented to trial counsel's strategy.

The trial court took the correct approach to determining whether Nixon consented to trial counsel's strategy. At the last evidentiary hearing, trial counsel testified that he discussed the strategy of not contesting guilt with the defendant and that Nixon did nothing after being advised of this. See *Nixon* v. *State*, 857 So. 2d 172, 175 (Fla. 2003) (*per curiam*). The trial court noted that it considered all of the appropriate circumstances before it issued its conclusion. See *id.*, at 176. An important factor was "that Nixon's pattern of interactions with counsel involved information being provided by [counsel], followed by silence from Nixon. In essence, the trial court found that Nixon's failure to approve or disapprove verbally was approval of counsel's strategy." *Ibid.* The trial court's conclusion follows the approach of *Roe* v. *Flores-Ortega*, 528 U. S. 470 (2000). Since consultation and silence is sufficient to bar an ineffective assistance claim under that decision, see *supra*, at 21, the same result is appropriate here.

Any doubts about the trial court's conclusion are resolved in its findings after the first evidentiary hearing. In its February 1, 1989 order, the trial court made three findings:

> "1. Trial Defense Counsel Corin reviewed with Defendant/Appellant Nixon the defense approach to the case in general terms including, but not limited to, the probability that he would concede the killing of the victim by Nixon.
>
> "2. Corin and Nixon had previous attorney-client relationships, both were veterans of the criminal justice system and although Nixon manifested no reaction, he understood what was to take place.

> "3. Nixon made no objection and did not protest the strategy and tactic employed at trial.
>
> "Based on the foregoing, this Court concludes that the Defendant/Appellant Nixon has not sustained his burden of proof by the applicable standard that he (a) was neither informed nor knew of the trial strategy and tactic employed by Defense Trial Counsel Corin nor (b) did not consent thereto or (c) acquiesce therein." *Nixon I*, 572 So. 2d, at 1340.

This is the correct approach to this case. It notes the defendant's burden of proving that he did not consent, and draws the appropriate conclusion from the consultation and silence. Nothing more was needed. The Florida Supreme Court's decision to ignore these findings and force trial counsel into a particular approach to communicating with the client cannot be squared with any reasonable definition of consent or effective assistance of counsel.

Nixon's trial counsel was faced with an unusually difficult case. The evidence of his client's guilt was overwhelming, and the crimes were horrific. See *supra*, at 2-3. In addition, he had a very difficult and uncommunicative client. See *Nixon III*, 857 So. 2d, at 187-188 (Wells, J., dissenting). "If the mouthpiece has no trumpet, blowing with all one's might will not tear down any walls." *Gerlaugh* v. *Stewart*, 129 F. 3d 1027, 1043 (CA9 1997). Conceding guilt in order to make a favorable impression with the jury in the penalty phase is an acceptable trial strategy. See *Abshier* v. *State*, 28 P. 3d 579, 594 (Okla. Crim. App. 2001). In a near hopeless situation like this "candor may be the most effective tool available to counsel." *People* v. *Mayfield*, 5 Cal. 4th 142, 177, 852 P. 2d 331, 343-344 (1993).

The hazards of sacrificing credibility in the jury's eyes by contesting hopeless points are well known to trial lawyers. "In any lawsuit, there are several potential issues .... Pick the best of these issues, and fight hard on this issue. Offer no resistance on other issues. By conceding these other issues and focusing

on the issue you have chosen, you are increasing your credibility in the eyes of jurors." S. Easton, How to Win Jury Trials: Building Credibility with Judges and Jurors § 1.05, p. 6 (ALI-ABA 1998).

Although a Florida capital trial is bifurcated, see *Espinoza* v. *Florida*, 505 U. S. 1079, 1080 (1992) (*per curiam*), it is still one trial before one jury. While the distinction between elements of the offense and sentencing factors is important in the law, see *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002), that distinction is not important to jurors, and hence it is not important to the strategy of arguing to the jury. A loss of credibility from contesting incontestable facts in the guilt phase can carry over to the penalty phase. "It is not good to put on a 'he didn't do it' defense and a 'he is sorry he did it' in mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney." Lyon, Defending the Death Penalty Case: What Makes Death Different?, 42 Mercer L. Rev. 695, 708 (1991).

Nixon's trial counsel was faced with a guilt case "that absolutely cannot be won." See *id.*, at 709. Between the forensic evidence, Nixon's possession of the spoils, and his confessions to people close to him as well as the police, there was no doubt of his guilt of felony murder and of death-eligible circumstances. The only real issue in this case was the sentence selection decision between death and life in prison. Although the judge is the final sentencer in Florida, judicial override of a jury recommendation of life is permitted there only in extreme circumstances. See *Harris* v. *Alabama*, 513 U. S. 504, 524 (1995) (Stevens, J., dissenting). Preserving credibility before the jury, even at the expense of admitting the incontestable proof of guilt, was a valid strategy for winning on the only winnable issue, as the trial judge in this case noted. See *Nixon II*, 758 So. 2d, at 630 (Wells, J., dissenting).

Counsel's decision to inform Nixon of his strategy and Nixon's implicit acquiescence is sufficient to establish his consent to this valid strategy. Nixon received a vigorous

defense, and the guilty verdict is reliable. The Sixth Amendment guarantees a fair trial, not a perfect one. Nixon got his fair trial, and he cannot now attack the result.

CONCLUSION

The decision of the Florida Supreme Court should be reversed.

May, 2004

Respectfully submitted,

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